IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 18TH SEPTEMBER 2007 / 27TH BHADRA 1929

FAO.No. 257 of 2007()

AGAINST THE ORDER DATED / / IN IA.712/2007 IN AS.81/2007 of SUB COURT, MUVATTUPUZHA
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APPELLANT/PETITIONER/PLAINTIFF

BIJU JOSEPH, S/O.JOSEPH,
KANDATHIL HOUSE, NOW RESIDING AT KATTAMANGALAM KARA, DO. VILLAGE.

BY ADV. SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.

RESPONDENTS: RESPONDENTS/DEFENDANTS
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1. PAULOSE, S/O.PAILY, MARCHERIL PUTHAYAM HOUSE, PIRAKUNNAM KARA, KUTTAMANGALAM VILLAGE.

2. JOSEPH, S/O.OUSEPH, KUTHANATTIL, NERAMANGALAM KARA, NERIAMANGALAM VILLAGE.

BY ADV. SRI.PEEYUS A.KOTTAM

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 18/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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F.A.O. NO. 257 OF 2007

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Dated this the 18th day of September, 2007

J U D G M E N T

This appeal is filed by the plaintiff in O.S. No.220 of 2004 on the file of the Munsiff's Court, Muvattupuzha. Plaintiff filed the suit against the defendants for a decree of permanent prohibitory injunction restraining them from constructing or forming a road through the suit property. During the pendency of the suit, there was an order of temporary injunction. The trial court dismissed the suit. Even after the dismissal of the suit till 30.4.2007 the operation of the judgment was stayed. Against the dismissal of the suit, plaintiff filed A.S. No.81 of 2007 before the Sub Court, Muvattupuzha on 23.5.2007. In that appeal plaintiff filed I.A. No.712 of 2007 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure for an interim order of temporary injunction restraining the defendants from trespassing into the plaint schedule property or converting portion of the same as a road and committing any waste. Defendants filed a counter

affidavit stating that there is already a motorable road which leads to the defendants' property through the plaint schedule property even before the filing of the suit. It was contended that during the pendency of the suit the same was not used but after the disposal of the suit the defendants opened a road on 15.5.2007 and they are using the same. Plaintiff filed a reply affidavit. It was stated that the allegation that from 15.5.2007 onwards defendants are using the road is not correct. It was alleged that the first respondent and his son trespassed in to the suit property on 27.6.2007 and uprooted three teak saplings and one anjily sapling and formed a road. It was further stated that a criminal case was registered against them. It was stated that at the instance of the plaintiff a Commissioner was deputed, who filed Exhibits C1 and C1(1) report and rough sketch. The Commissioner after inspecting the suit property reported that on the date of his inspection he found a pathway in existence but there was obstruction to the road by dumping granite stones. It is admitted by the plaintiff that it was he who unloaded the granite stones in the pathway. The lower appellate court

relying on the report of the Commissioner held that since a motorable road was opened before the filing of the petition, the plaintiff-appellant is not entitled to get any relief and dismissed the injunction petition. Challenging that order, plaintiff has filed this appeal.

2. Learned counsel appearing for the plaintiff has argued that the lower appellate court has failed to note that till 30.4.2007 there was no road as pointed out by the defendants and even according to them they formed the road only on 15.5.2007. It is argued that even that date is not correct. The road was formed only on 26.5.2007 and immediately after forming the road appellant gave first information statement before the Oonnukal Police Station, which registered crime No.138 of 2007 against the defendants on the basis of the compliant.

3. I do not think it necessary to consider when exactly the road was formed. The fact remains that during the pendency of the suit there was order of injunction restraining the defendants from entering into the suit property or using any portion of the same as a pathway and

other reliefs. Even after the disposal of the suit the trial court passed an order staying the operation of the judgment passed by it. Though it may not have any effect of injunction, both sides understood that as an order to maintain status quo. That being the position, I am of the view that it is only just and proper to restrain the defendants from taking any vehicle through the disputed pathway till disposal of the appeal. It is made clear that this order will not be a bar for the defendants or persons claiming under them for walking through the pathway. Learned counsel for the defendants submitted that a direction may be issued to the plaintiff to remove the granite stones dumped by him in the pathway. Learned counsel for the plaintiff submitted that defendants filed I.A. No.1144 of 2007 for the very same relief before the lower appellate court and the lower appellate court dismissed that petition. In view of the fact that the defendants have already moved the court below and invited an adverse order, I do not think it just and proper to consider that aspect in this appeal. It is open to the defendants to pursue the remedies available to them in that regard in accordance with law. I make it clear that I am not

expressing any opinion regarding the contentions raised on either side on merits. This order is only a temporary arrangement.

In the result, the appeal is allowed in part. The defendants are restrained from taking vehicles through the disputed pathway till the disposal of the appeal. There will be a direction to lower appellate court to hear and dispose of the appeal as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of this judgment.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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F.A.O. NO. 257 OF 2007

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J U D G M E N T

18TH SEPTEMBER, 2007